No. 11096.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SISQUOC RANCH COMPANY, a corporation, on its own behalf and on behalf of Homer Sheldon Green,

Appellant,

vs.

MAX ROTH, Lt. Colonel, Infantry, Army of the United States,

Appellee.

APPELLANT'S REPLY BRIEF.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

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Statute.

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I.

The Issue on Appeal.

Appellee's brief leaves the impression that this is an appeal after a hearing on the *merits,* as if issue had been joined below. In fact, it is devoted almost entirely to argument based on "evidence" outside the record on which, presumably, appellee would have liked to have built a defense. Appellee, however, did *not* join issue below with the petition but merely, in effect, demurred. Since the District Court refused to issue the writ, the only question here is whether the petition as amended is suf-

ficient and, for that purpose, all material allegations must, as a matter of law, be deemed to be true.

In addition, appellee's attorney stated in the court below that he "could add nothing" to the petition as amended [R. 44], and that there was "no dispute with reference to the facts stated in the petition and the amended petition" [R. 46], which led the Court below to state that it could see no reason why "there should be any necessity for a hearing."[1] [R. 46.]

So appellee, not having joined issue with the petition as amended, is, for better or worse, limited to the petition so far as the facts on this appeal are concerned.

What then are those facts? The petition as amended is clear: (1) no notice was given to appellant or Green before Green's reclassification from Class II-C to Class I-A; (2) the reclassification action was not supported *by any evidence whatsoever* either that Green no longer remained engaged in essential agriculture or that he was replaceable; (3) appellant was denied a hearing before the local board even though prompt request had been made, and (4) the Appeal Board affirmed the local board's action despite the fact that there was *no* evidence either

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[1]Now appellee tries to hedge on his concession by stating it related only to facts concerning "procedural steps" and not to other facts alleged in the petition (Appellee's Br. p. 7)—assertedly because appellant raised only questions of procedural due process below. However, a glance at the petition as amended will readily show that questions of substantive as well as procedural due process are squarely raised by the petition [R. 8, 13, 14, 37, 39, 40, and 41]. Furthermore, it will be noted that appellee made no comment when the Court, on the basis of the concession referred to, stated: "It will therefore be assumed that all of the facts stated in the petition and the amendment to the petition for the Writ of Habeas Corpus are conceded by the Government the same as if a hearing were held" [R. 46].

that Green did not remain engaged in an essential agricultural occupation or was replaceable, and despite *substantial and uncontradicted evidence* affirmatively showing that Green remained engaged in essential agricultural occupation and was irreplaceable.

These are the *only* facts on which appellee may argue its case—not on facts outside the record, or which appellee might have introduced in evidence at a hearing, such as the Selective Service Questionnaire and the rest of the draft board file on Green, to which appellee makes repeated reference in his argument (Appellee's Br. pp. 3, 7, 8, 19).

The sole question here, therefore, is whether the petition as amended states a sufficient cause of action to warrant the issuance of a writ[2] and to entitle appellant to a hearing on the merits. And until that stage is reached, most of appellee's argument is beside the point.

II.

Judicial Review.

Appellee disposes of the vital question of judicial review with a wave of the hand and the easy generalization that "It is settled, *of course*,[3] that Congress having made no provision in the Selective Training and Service Act for the review of draft board classifications by the courts, no such review will be undertaken" (Appellee's Br. p. 7). Appellant respectfully submits that if this proposition is so well settled as to require no citation of authority,

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[2]The statement made by appellee (Appellee's Br. p. 6) that "The sole question presented is whether Green was denied due process by the selective service boards," is clearly erroneous, as there was no hearing below on the merits.

[3]Italics ours.

despite the numerous citations and quotations to the contrary appearing in appellant's brief from pages 24 to 35, appellee should have closed his brief at that point without any further argument, as no one aggrieved by a draft board decision would then be entitled to a day in court.

The answer, of course, is that the courts will undertake judicial review of draft board actions alleged to be in violation of law and to constitute a deprivation of due process (see authorities cited in appellant's brief pp. 24 to 35).

III.

The Effect of the Tydings Amendment.

The heart of appellee's position seems to be the statement, also totally unsupported by citation of authority, that "every person deferred in Class II-C could have been reclassified I-A and inducted into the armed forces," even if the draft boards determine such person to be regularly engaged in essential agriculture and to be irreplaceable (Appellee's Br. pp. 19-20). In other words, appellee takes the position that the Tydings Amendment—an act of Congress—can be disregarded by draft boards with impunity and that these administrative agencies are completely above the law and beyond reproach.

If true, this astounding theory would undermine the very freedoms for the defense of which the military might of this nation was marshaled. We doubt seriously whether even the Selective Service Authority would subscribe to it, for Lewis B. Hershey, Selective Service Director, in an article quoted in appellee's brief, beginning on page 10, seems to admit that the Tydings Amendment does have force of law. Indeed, that statement by Hershey, in lucidly outlining the duties of the draft boards under the Tydings Amendment, puts the finger on the very thing

appellant complains was not done in this case. To quote from appellee's brief, on page 11, Hershey stated:

> "It (the Tydings Amendment) vests in the local boards the *duty* of determining, in the case of each registrant, whether or not such registrant meets the requirements of law after a *full* consideration of *all* of the pertinent facts. *These facts include the extent the registrant is engaged in agriculture, how essential in the war effort are the products of his efforts, how necessary is he to this production, and whether there is a replacement available.*" (Italics ours.)

Appellant's main grievance is that the draft boards caused Green's induction without giving consideration to *any* "of the pertinent facts"—the facts regarding Green's agricultural activities, the essentiality to the war effort of the products of his effort, his necessity and irreplaceability, and the findings of the U. S. Department of Agriculture War Board strongly recommending Green's deferment. The petition as amended squarely alleges that the Appeal Board had *no evidence whatsoever* before it on these issues, except *substantial and uncontradicted evidence* to the effect that Green remained engaged in an essential agricultural occupation and was irreplaceable. The propriety of an induction on such a record is the issue that appellee must meet on this appeal!

IV.

The So-called Presidential Findings.

Appellee's brief makes numerous references to a so-called "finding" by the President "that the need for all of the men now agriculturally deferred in II-C under 26 years of age is not as essential to the war effort as is the need for young men in the armed forces" (Appellee's Br. pp. 12, 14, 15). Presumably, appellee is grasping at this straw

to cure the total lack of evidence to support Green's induction. Obviously even this so-called "finding" can be of no assistance. First of all, the sole power to make findings rests in each case with the draft boards.

Title 50 App. U. S. C. A. 310 (a) (2);

Falbo v. United States, 320 U. S. 549;

United States v. Peterson, 53 F. Supp. 760 (D. Calif. 1944);

United States v. Kowal, 45 F. Supp. 301.

Secondly, the so-called "finding" merely says that men under 26 years of age were more needed in the armed forces than on the farms, and therefore has no relation whatever to the criteria prescribed in the Tydings Amendment governing the question of agricultural deferability, viz., (1) continuance in essential agricultural occupation, and (2) irreplaceability. Obviously, the "finding" could not supply deficiencies in evidence on the two cardinal points prescribed by Congress, for otherwise an apparently oral, unpublished "finding" by the President contained in an unpublished letter from the head of one of his administrative agencies to the head of another, could effectively repeal any act of Congress.

V.

Denial of Hearing.

Appellee answers appellant's complaint that it was denied a personal hearing before the local board, by stating that Selective Service Regulations make "no provision for the appearance of the registrant's employer before the local board," and then gives the surprising advice that "appellant's complaint, if any, should be directed toward the

appeals board, which, however, grants no personal hearings to registrants" (Appellee's Br. p. 22). In other words, if we understand appellee's point, appellant was entitled to *no* hearing *anywhere* because Selective Service Regulations make no provisions therefor. This, of course, begs the question for, as argued in appellant's brief beginning on page 26, the denial of a hearing to appellant, constituted a denial of due process and inconsistent regulations are, to that extent, mere nullities.

Conclusion.

We respectfully submit that appellee has utterly failed in its brief to meet—or even to argue—the issues involved in this appeal, and appellant's authorities have been completely ignored.

This case is just an instance of administrative action totally unsupported by evidence and of other denials of due process. These issues are squarely raised by the petition as amended and are the only issues before this Court. We submit that it was error for the District Court to refuse to issue the writ.

Respectfully submitted,

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